

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
UNITED STATES OF AMERICA, : 02-cr-1188 (JS) (ARL)  
:   
- versus - : U.S. Courthouse  
: Central Islip, New York  
CARLOS ARTURO PATINO RESTREPO, :  
Defendant : February 19, 2009  
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR CONFERENCE  
BEFORE THE HONORABLE ARLENE R. LINDSAY  
UNITED STATES MAGISTRATE JUDGE

**A P P E A R A N C E S:**

**For the Government:**

**Benton Campbell, Esq.**  
United States Attorney

BY: **Allen Bode, Esq.**  
Assistant U.S. Attorney  
610 Federal Plaza  
Central Islip, New York

**For the Defendant:**

**Todd Merer, Esq.**  
41 Madison Avenue  
New York, New York

**Official Transcriber:**

**Rosalie Lombardi**

**L.F.**

**Transcription Service:**

**Transcription Plus II**  
823 Whittier Avenue  
New Hyde Park, N.Y. 11040  
(516) 358-7352  
Transcriptions2@verizon.net

Proceedings recorded by electronic sound-recording,  
transcript produced by transcription service

**Proceedings**

1 THE CLERK: Calling United States of America v.  
2 Patino Restrepo, 02-cr-1188.

3 Attorneys, can you make your appearance for the  
4 record.

5 MR. BODE: Allen Bode for the government.

6 Good morning, your Honor.

7 THE COURT: Yes, good morning.

8 MR. MERER: Todd Merer for Mr. Patino.

9 Good morning, your Honor.

10 THE COURT: Yes, good morning.

11 MR. MERER: Your Honor, would it be all right  
12 if I moved the lectern so I can --

13 THE COURT: Of course. And I would like you to  
14 remain seated and speak into the mic because that will  
15 give us the best record.

16 Let's swear in the interpreter, please.

17 (INTERPRETER SWORN)

18 THE CLERK: Please state your name for the  
19 record.

20 THE INTERPRETER: Maya Bray (phonetic),  
21 certified Spanish federal court interpreter.

22 Good afternoon.

23 THE COURT: Yes, good morning.

24 THE INTERPRETER: Good morning.

25 THE COURT: So as counsel are aware, the day

**Proceedings**

1 before yesterday Judge Seybert asked me to take a look at  
2 these issues that have been raised by the defendant and  
3 to report back to her on the question of how to resolve  
4 how I would recommend she resolve some of these matters,  
5 those being specifically whether the conditions of the  
6 defendant's pretrial confinement are constitutional,  
7 whether or not there was some requirement of an  
8 exhaustion of administrative remedies in the first  
9 instance before we can consider that issue, whether or  
10 not the case was properly designated a Long Island case  
11 and whether or not the defendants should be permitted  
12 joint defense meetings. I think those are the central  
13 issues that have been referred to me for resolution, as  
14 well as to hold any evidentiary hearings as may be  
15 necessary to resolve those issues.

16 But there are a couple of preliminary things I  
17 would like to understand first. As I said, this matter  
18 was just handed to me, so I have tried to familiarize  
19 myself with the record up to this point, pulling some of  
20 the transcripts of conferences before Judge Seybert but I  
21 am confused about a couple of things.

22 Number one, up to this point, have both the  
23 defendants appeared together in proceedings?

24 MR. BODE: No, your Honor, separate -- on  
25 separate days.

**Proceedings**

1           THE COURT: Okay. So they have not been  
2 brought in together. So that there would be no reason  
3 not to proceed in the -- with the application of the  
4 defendant Patino first then, even though the issues may  
5 be identical.

6           MR. MERER: May I address that?

7           MR. BODE: Yes. And defense counsel for  
8 Vallejo is also having some -- as your Honor may know,  
9 some medical issues.

10          THE COURT: Right, I understand that. That's  
11 why I am asking these questions.

12          Mr. Merer?

13          MR. MERER: Your Honor, if I might. I have  
14 spoken to Mr. Testaverde. He is, of course, well aware  
15 of today's proceeding. As the Court may be aware, he has  
16 joined in my motions.

17          THE COURT: I understand that.

18          MR. MERER: He does have a status conference  
19 scheduled before Judge Seybert I believe on the 23rd of  
20 March. We do not yet. I suppose our status would be  
21 pending your decision eventually but he understands that  
22 I am here today. He knows that he has filed jointly with  
23 me and I suppose he understands that whatever  
24 ramifications come from today's hearings will apply to  
25 his client, as well.

**Proceedings**

1 THE COURT: Right.

2 MR. MERER: He had an accident, so he is unable  
3 to articulate.

4 THE COURT: I understand that. So when you say  
5 he understands, although the review will be limited to  
6 your client. It clearly is going to have some influence  
7 on the process as to his client, as well.

8 MR. MERER: Clearly, your Honor. But I believe  
9 that he submitted a motion in which he joins with my  
10 motion and together with that motion he submitted  
11 Mr. Vallejo's affidavit.

12 THE COURT: Okay.

13 MR. MERER: So I think these fulfill the  
14 requirements procedurally.

15 THE COURT: Of preserving his rights.

16 MR. MERER: Yes.

17 THE COURT: Yes.

18 MR. MERER: Yes.

19 THE COURT: I agree with that. And I may be  
20 mistaken but I was under the impression that  
21 Judge Seybert may even refer that upcoming status  
22 conference to me, given that it may relate to the same  
23 issues.

24 MR. MERER: That may be. Your Honor, if I just  
25 might touch on some of the things you just said. As you

**Proceedings**

1 know, we had two rather lengthy status conferences  
2 or/hearings dealing with these issues before the district  
3 judge. I was a little surprised, I suppose that at this  
4 point it was referred to your Honor. And I didn't really  
5 learn about that and I amended my latest letter to  
6 yourself yesterday.

7 THE COURT: Yes.

8 MR. MERER: What I did though, for the Court's  
9 convenience, is put together a packet. There's nothing  
10 in it that the government doesn't already have. It  
11 consists not only of some of the motions and the  
12 government responses but of some of the earlier letters  
13 and correspondence and some of the other matters were  
14 referred to in those motions, so that -- and I put an  
15 index in front so your Honor can refer to it.

16 THE COURT: That's very helpful because I have  
17 been trying to pour through the record.

18 MR. MERER: May I hand this up?

19 THE COURT: But I don't believe I have a  
20 complete understanding of what's occurred up to this  
21 point. But based on what I have reviewed, I have one  
22 initial matter that I need to discuss with counsel and I  
23 am not sure whether or not it prevents me from even  
24 reviewing this whole issue and that is that in reviewing  
25 the record that I was able to pull together, I noted that

**Proceedings**

1 the marshal who did the ex parte proffer before  
2 Judge Seybert -- now it's my understanding that that  
3 proffer after reading it was to report to Judge Seybert  
4 what the US Marshals' investigation consisted of. And  
5 specifically, although it's ex parte, I think it's fairly  
6 well understood that the marshal's proffer concerned  
7 interviews of informants who were able to provide  
8 information with respect to the threats that are the  
9 subject matter of this hearing and the basis upon which  
10 the government has insisted that the SHU is appropriate.

11           That marshal, you know, sitting here like, you  
12 know, feeling funny about this, but that marshal is  
13 dating my daughter, okay? And, you know, it's not my  
14 practice to -- I hate talking about this but I don't feel  
15 I can't not talk about it. I looked at it and I thought  
16 well, my sense of this is and I'll -- you know, I need  
17 some feedback from counsel on this, that I am not sure  
18 what kind of reliance the government is going to place on  
19 that, whether I have to make credibility findings with  
20 respect to that marshal. My sense is that the answer to  
21 that question is no but I don't know that for a fact.

22           Based on the proffer that I read, the marshal  
23 had spoken to several individuals and was simply  
24 reporting to the judge what those individuals had  
25 indicated with respect to the threats. Ultimately, if we

**Proceedings**

1 get to an evidentiary hearing, we have to get to the  
2 source, not to the middle person so that as long as I  
3 don't have to review the credibility of the marshal, I  
4 feel I can go forward. I also understand that this  
5 marshal has been re-assigned and is not longer in the  
6 threat assessment unit.

7           So I put that out there. Again, I don't want  
8 to start something that I can't finish or that anybody  
9 feels uncomfortable with. So I think that that has to be  
10 reviewed. I certain feel that I can address the issue as  
11 to whether or not this is a Long Island case. I could  
12 help her in that regard but I would like some response  
13 from counsel.

14           MR. BODE: If I may, your Honor, first just the  
15 scope of the referral doesn't -- wouldn't seem to  
16 implicate this at this point. I mean there may be  
17 further proceedings but the scope of the referral at this  
18 point, doesn't encompass the threat aspects of this.  
19 It's whether the defendants should be permitted joint  
20 defense meetings, whether defendants have standing to  
21 challenge the conditions of their confinement absent  
22 exhaustion of administrative remedies and if so, whether  
23 their current conditions violate constitutional rights.

24           In terms of those questions, we don't have to  
25 get to that aspect of the case, I submit. But obviously,



**Proceedings**

1 I will leave it up to the --

2 THE COURT: I am not sure that I agree with  
3 that, Mr. Bode, because my -- if we get past the  
4 exhaustion question, then the review of the Court is  
5 going to be whether or not there is a rational basis for  
6 the segregation. And whether or not the segregation  
7 really addresses what you say is the reason the  
8 government has demanded this segregation.

9 So that review is, of course, going to require  
10 the Court to go into the underlying claims. Now that's  
11 why I thought that you know, it's not going to be done  
12 through the intermediary of a marshal. It's going to  
13 have to be the Court perhaps having its own ex parte  
14 communication with the actual source.

15 But I don't see any need to call back the  
16 marshal to ask him to repeat to me what he's already said  
17 to Judge Seybert. That part of it I am very clear about.

18 MR. BODE: Well additionally, there are you  
19 know -- I have my office investigator, Mr. Cox  
20 (phonetic), who was also present for all those proffers  
21 as well, so -- well actually, I take that back. There  
22 might be some things that the marshal was privy to that  
23 we were not but I will have to look at that question.

24 THE COURT: Okay. So I mean it's something  
25 that you need to explore and then I need to hear from the

**Proceedings**

1 defense.

2 MR. MERER: Your Honor, I concur totally with  
3 what you said. It's quite clear that if we get past the  
4 exhaustion issue and I am hoping we shall, that this will  
5 relate more to Basciano which is a case I know your Honor  
6 is well familiar with.

7 THE COURT: Right. And that's where I am  
8 drawing my conclusions from.

9 MR. MERER: Right. And, you know, so quite  
10 clearly the marshal comes into full play. Having said  
11 that, your Honor, if I just might digress and give you a  
12 little bit of a history of how it came to be that the  
13 marshal was present according to what I understand.

14 THE COURT: Go ahead.

15 MR. MERER: At the very first appearance when  
16 Mr. Patino --

17 THE COURT: And just so it's clear, we're  
18 talking about Marshal Rosado (phonetic).

19 MR. MERER: Apparently, yes.

20 THE COURT: Yes.

21 MR. MERER: That's the only marshal I know of  
22 at this point; right.

23 THE COURT: It wasn't Ms. McFarland (phonetic)?

24 MR. MERER: No.

25 THE COURT: I don't know, she's --

**Proceedings**

1 MR. MERER: She's an attorney.

2 THE COURT: She's the --

3 MR. MERER: Yes.

4 THE COURT: Okay.

5 MR. MERER: I see your Honor has read the  
6 transcripts; okay. At the very first appearance when  
7 Mr. Patino was arraigned, prior to that appearance, I had  
8 had a dialogue with AUSA Klapper in which she made  
9 comments that I found disturbing which I have outlined in  
10 my letters and in my pleadings.

11 So I made a motion requesting a hearing because  
12 I knew already that AUSA Klapper and/or other people in  
13 the government had designated Mr. Patino to the SHU. I  
14 didn't know at that point about the bar against  
15 co-defendant meetings but I did know about the SHU.

16 Her response was that it was an early juncture  
17 in the case and that she understood this case was very  
18 unusual because it was not only Mr. Patino having a  
19 problem with the SHU, it was the government having a  
20 problem -- I should say the eastern district having the  
21 problem with Mr. Patino because he had filed an extortion  
22 complaint against the case agent.

23 THE COURT: Okay.

24 MR. MERER: So that was complicated. And  
25 Judge Seybert made a Solomon-like decision. She said it's

**Proceedings**

1 not going to be my choice. It's not going to be up to  
2 the ICE agents or the United States attorney, I am going  
3 to delegate the marshal to investigate which --

4 THE COURT: Which part though? To investigate  
5 the --

6 MR. MERER: To investigate the threats  
7 allegation which is why he was being put in the SHU.

8 THE COURT: Okay.

9 MR. MERER: That's what happened and that was,  
10 I believe, on the 28th or 9th of October, on his first  
11 appearance. From that point forward, I heard nothing at  
12 all about what the marshal was doing, although I had made  
13 several informal inquiries. I assumed he would reach a  
14 point. But I also knew having read the case law and  
15 understanding the administrative aspect, that some time  
16 had to go by before I became proactive if nothing  
17 happened. And indeed, we reached a point where we made  
18 the motion, the first motion, which led us here today.

19 At the hearing, or at the status conference,  
20 Mr. Bode stated and that was the first time I was aware  
21 of it, that he had had an opportunity to proffer several  
22 witnesses to this alleged threat and that as part of the  
23 marshal's investigation, he had asked a marshal and that  
24 was Mr. Rosado, Marshal Rosado, who was in court. I  
25 hadn't seen him before to sit in.

**Proceedings**

1 THE COURT: Okay.

2 MR. MERER: And it was my understanding, and I  
3 may be wrong, you've read the transcript, at least it was  
4 my understanding of what Mr. Bode said that the marshals'  
5 process was not to ask questions but simply to observe  
6 and draw conclusions. I found that kind of strange  
7 because I knew, being familiar with the way the  
8 government does business, that Mr. Bode was not talking  
9 to a witness who had not spoken to law enforcement  
10 before.

11 And that disturbed me because one of the  
12 allegations we're making that Agent Viola (phonetic) in  
13 his own attempts at self-preservation, be they what they  
14 may, that's a separate issue that we have no control  
15 over, was very concerned about establishing his  
16 innocence, I suppose if that's the word, or that these  
17 allegations were false. And we felt very strongly based  
18 on knowledge we already had from other witnesses, that he  
19 had spoken to these witnesses before or his brother  
20 officers ha spoken to them before, and that therefore,  
21 Mr. Bode was then talking to witnesses that had proffered  
22 already to the government. So they basically were  
23 repeating what was already accepted and it was done for  
24 the benefit of Marshal Rosado.

25 So if Marshal Rosado's input is simply based on

**Proceedings**

1 repeating what he observed, and I agree with your Honor  
2 that it doesn't matter because we're not talking about  
3 his credibility. And I don't see how, in fact, his  
4 credibility does come in unless there's some point where  
5 your Honor or if it's ever available to the defense,  
6 looks at it and says now wait a minute, here's something  
7 that the marshal said that doesn't jive with what was  
8 said earlier.

9           There's another aspect to that, your Honor.  
10 And that is that there's been a disturbing pattern in  
11 this case and I will refer to it later on as we go along.  
12 But in this instance, the original two witnesses to this  
13 alleged threat that Mr. Patino made well over a year ago  
14 before he was extradited for which he was never charged,  
15 for which he was never separated from his co-defendant,  
16 but the original witnesses to the threats were both  
17 represented by attorneys who happened to have defendants  
18 in this case who, upon information and belief, are  
19 cooperating.

20           There are also several other witnesses out  
21 there that I suspect are going to verify or substantiate  
22 that alleged threat who also are represented by counsel  
23 in this case. And again, this is something that if the  
24 marshal was going to make a true evaluation about, he  
25 certainly should have been apprised of, so he knew that

**Proceedings**

1 there was some back story to what was happening and he  
2 certainly should have had the ability to totally cross-  
3 examine.

4           Apparently he didn't. Apparently the government  
5 felt that by him simply observing, he could draw a  
6 conclusion. And I would submit to the Court that that  
7 conclusion could just as easily be reached by your Honor  
8 by reading the transcript.

9           And I would also submit that hopefully we'll get  
10 to a point where if, in fact, the administrative remedy  
11 exhaustion issue is overcome, that we can deal directly  
12 with the witnesses and we don't have a problem.

13           So the answer to that is, I agree with  
14 your Honor. I don't think we have a problem. I can't  
15 imagine Marshal Rosado's integrity or judgment or  
16 whatever he did in this case, coming into play. But it  
17 is possible. It is possible.

18           Your Honor's read the ex parte statements. I  
19 don't know. I am perfectly willing to go along with  
20 your Honor's judgment on it. I think -- in fact, I am  
21 more than willing, I would ask to go ahead because this  
22 is a matter that I think we have to expedite.

23           Mr. Patino has been not only put in the SHU,  
24 he's been put in the highest priority in the SHU which  
25 requires a lieutenant's presence whenever he is moved.

**Proceedings**

1 Apart from the problems that he's having, and your Honor  
2 knows how the Basciano referred to that as the nuclear  
3 option of the SHU, counsel has terrible problems.  
4 Because there has to be a lieutenant present when we  
5 visit, and I refer to myself, my paralegal or other  
6 members of my office that may visit, we have to wait for  
7 the lieutenant. We have to wait for the lieutenant when  
8 we leave. It's not at all unusual that we'll get there  
9 at 1 o'clock, finally get to see Mr. Patino at 3:00, when  
10 four guards including the lieutenant escort him,  
11 handcuffed behind his back, 50 or 60 feet from his cell  
12 to the attorney interview room. And then we have to  
13 sometimes wait, a I have noted in my pleadings and my --  
14 in the letters, three or four hours after we're done.

15           So it's six or eight or even nine hours to  
16 visit him. And this is inside of the process where his  
17 mental capacity, I won't call it diminished, is  
18 scattered. He's totally isolated. He gets 15 minutes  
19 phone a month to his family. The last such call, lasted  
20 one minute. Now AUSA Bode has just given me a letter  
21 saying that he's looking into restoring that lost 14  
22 minutes but this is three weeks later.

23           The man's totally isolated. It's very  
24 different for him to -- very difficult for him to  
25 focus --



**Proceedings**

1 THE COURT: Mr. Bode, sit down, please.

2 MR. MERER: It's very difficult for him to  
3 focus when we speak. From what I gather, discovery  
4 hasn't started yet, as least insofar as he is concerned  
5 but I am fairly certain that when we go to trial, and I  
6 believe we will, that the evidence against him  
7 overwhelmingly will consist of eyewitness testimony.

8 And we have a good idea of who most of those  
9 witnesses are and we are doing a lot of investigation to  
10 counter what we expect we'll be hearing. And it's  
11 extremely important that we dialogue with Mr. Patino  
12 regularly and we can't.

13 So his defense is suffering and I am truly  
14 alarmed that he is deteriorating to the point where he is  
15 becoming resigned to the fact there's nothing that could  
16 be done. He speaks Spanish, so when he's -- a unit  
17 counselor knocks on his doors, they do once a day, you  
18 okay, Patino? And before he can answer, they're gone.  
19 He asks for a blanket, it doesn't come. He asks for  
20 thermal underwear. This is a minor issue but one that  
21 came out in the last hearing where Ms. McFarland said,  
22 but we got him his thermal underwear. That's not true.  
23 He never got it. He never got it because it's not on his  
24 commissary form. And every time he asks for it, they  
25 said don't worry about it.

**Proceedings**

1           It's just as he's never gotten any of the  
2 administrative procedure requirement forms; BP-8, BP-9  
3 and so on. So it's not even a question of whether or not  
4 we've exhausted our administrative remedies, they have  
5 exhausted us. And even were we to begin that process, it  
6 would undoubtedly last, if it lasted, well past the time  
7 where trial has begun, conducted and concluded. And the  
8 government will have had its way and we will have a  
9 defendant with a diminished capacity to prepare for  
10 trial, counsel unable to provide him with the assistance  
11 he should have all because of a situation where the  
12 government is refusing to make available whatever  
13 witnesses they have against him.

14           And again, I should point out, your Honor, this  
15 supposed threat that he made was not charged. He wasn't  
16 extradited for it. He can't be tried for it. So any  
17 witnesses that the government might supply, so that the  
18 Court and counsel can cross-examine them and conclude --  
19 the Court can conclude whether or not, in fact that  
20 threat is real, in fact whether it fits into the  
21 parameters of Basciano, doesn't have any impact on the  
22 trial. The government isn't giving away something in  
23 advance. These are people that are here solely for that  
24 purpose.

25           And I will point out to your Honor that some of

**Proceedings**

1   them, I am told, have already gotten cooperation  
2   agreements based solely on their verification of that  
3   threat and that's because Agent Viola has been active in  
4   the jails in New York, in the jails in Washington, D.C.,  
5   in the jails in Florida and throughout Colombia, even  
6   though he is no longer assigned to the case according to  
7   Mr. Bode's letter at the very outset. He's out there.  
8   He's talking to people. He's saying tell me about the  
9   threat. Tell me how his wife is involved in the threat.  
10   Tell me this and maybe you don't have a problem. Don't  
11   tell it to me and maybe you will have a problem.

12               That's what's going on your Honor and I am not  
13   repeating hearsay. I will supply that to the Court ex  
14   parte if the Court so asks. So having run on at length  
15   at what I said would be a brief statement, your Honor,  
16   the answer is I think we can overcome the Rosado --  
17   Marshal Rosado problem and proceed.

18               THE COURT: Mr. Bode, you hesitated as to  
19   whether or not you were going to have to rely on  
20   Mr. Rosado or Agent -- Marshal Rosado for whatever  
21   presentation you -- the government might be required to  
22   make.

23               MR. BODE: Yes, your Honor. Well, we have --  
24   we've discussed this at length before Judge Seybert at  
25   the last proceeding. Judge Seybert -- and I don't know

**Proceedings**

1 if the referral's changed this but Judge Seybert talked  
2 as proceeding as a bail hearing, in essence, at which  
3 hearsay is admissible and I could use hearsay.

4           You know, these witnesses, you know, I have to  
5 -- there's a very real worry that should a witness  
6 testify that Mr. Patino will have their family murdered  
7 in Colombia.

8           THE COURT: Well, that's an issue that --

9           MR. BODE: So, we've got to deal with --

10          THE COURT: -- can be dealt with.

11          MR. BODE: Yes.

12          THE COURT: I --

13          MR. BODE: So we've got to deal with those  
14 issues. So, you know, I -- if the situation's changed  
15 since we were in front of Judge Seybert, you know, I will  
16 accept that but obviously it's a little early yet to even  
17 go down that road.

18               I would like to address, if I can, the comments  
19 of counsel especially regarding the administrative stuff  
20 because this is really the defense engineering a crisis,  
21 your Honor. The letters, which I gave to counsel this  
22 morning and I handed up to the Court, are actually  
23 letters that Mr. --

24          THE COURT: You see, you're jumping ahead of  
25 this because again, I wanted to resolve this question of

**Proceedings**

1 whether or not I am going to be involved in the decision  
2 making process first before I hear all of the argument  
3 about the merits.

4 MR. BODE: Okay.

5 THE COURT: Okay.

6 MR. BODE: So just --

7 THE COURT: There is one topic that I can  
8 address with no problem at all and that's --

9 MR. BODE: I will confine myself just to his  
10 comments about the marshals then and I will get to the  
11 other comments and some of his misstatements in a moment.

12 Regarding the marshal's -- counsel is incorrect  
13 in that the marshals were investigating these threats  
14 before the Court appearance. This isn't an assignment by  
15 Judge Seybert is my understanding. As your Honor knows,  
16 marshals investigate threats against AUSAs. So they're  
17 the agency that's tasked with that. So that's -- my  
18 belief is that and you can confirm that with the  
19 marshal's service that that began --

20 THE COURT: Well, hold on; your belief or you  
21 know?

22 MR. BODE: Well I was just talking to Agent Cox  
23 about the time frame.

24 THE COURT: Yes.

25 MR. BODE: And it's both of our recollection

**Proceedings**

1 that the marshals had already -- we had already spoken to  
2 the marshals about the threat before the Court  
3 appearance.

4 THE COURT: Okay.

5 MR. BODE: But, you know, I would double check  
6 because it's been a few months, but I am sure that  
7 happened before the Court appearance.

8 THE COURT: All right.

9 MR. BODE: Next, in terms of the --

10 THE COURT: But did the government --

11 MR. BODE: -- marshal's interactions --

12 THE COURT: -- the United States Attorney's  
13 Office initiate its own investigation; that is through  
14 either my own or other --

15 MR. BODE: We're investigating the threat  
16 aspect of this case. What was the question?

17 THE COURT: The question was to the extent that  
18 there was an allegation of threat against the United  
19 States attorney --

20 MR. BODE: Yes.

21 THE COURT: -- you say that that matter was  
22 referred to the marshal. Was the matter of the threat  
23 against the agent, who was also I understand the subject  
24 of an alleged threat --

25 MR. BODE: Yes.

**Proceedings**

1 THE COURT: -- was that something that was  
2 referred to the marshal's office or was that done --

3 MR. BODE: The marshals don't -- will not  
4 investigate --

5 THE COURT: Correct.

6 MR. BODE: -- threats against agents.

7 THE COURT: So it is going to go to the agency  
8 that Viola's attached to.

9 MR. BODE: Yes, yes. And --

10 THE COURT: Did they undertake an  
11 investigation?

12 MR. BODE: Well, we have -- as part of this,  
13 myself, Investigator Cox and a couple of agents from  
14 Homeland Security, we have been investigating that aspect  
15 of it.

16 THE COURT: All right.

17 MR. BODE: In addition, there's --

18 THE COURT: So, that's a separate  
19 investigation?

20 MR. BODE: Yes.

21 THE COURT: Undertaken about the same time as  
22 the investigation by the marshals of the United States  
23 attorney assistant, threat?

24 MR. BODE: Yes.

25 THE COURT: Okay.

**Proceedings**

1 MR. BODE: I would say yes.

2 THE COURT: So two simultaneous investigations.

3 MR. BODE: Yes. And there's a third  
4 investigation which is the result of the defendant's  
5 complaints, he got an Office of Inspector General  
6 investigation going based upon a Colombian -- an  
7 investigation that began in Colombia that -- the  
8 investigation in Colombia since concluded that the  
9 prosecutor in Colombia concluded there was no basis to it  
10 and actually recommended an investigation of Patino,  
11 Vallejo and Vallejo's wife be undertaken.

12 That Colombian prosecutor also publicly  
13 released the findings. She also made allegations of  
14 corruption in her own agency against her bosses, et  
15 cetera. It's my understanding she was then promptly  
16 fired from her agency.

17 But all that aside --

18 THE COURT: All right. So that was through the  
19 office of the Inspector General?

20 MR. BODE: Yes, that's the basis of what the  
21 Inspector General began --

22 THE COURT: All right.

23 MR. BODE: -- an investigation of. In terms of  
24 the -- Marshal Rosado's interactions, I am really not  
25 sure where counsel gets what he is claiming in terms of,



**Proceedings**

1 you know, Marshal Rosado was only able to observe and was  
2 not able to ask questions, that's simply not the case.  
3 And I really have no clue where counsel gets that from.

4 As I have noted at prior court proceedings,  
5 he's -- Mr. Merer has a colorful way of speaking and  
6 sometimes his words get away from him and he goes off on  
7 tangents.

8 THE COURT: You know, I don't want to hear  
9 personal characterizations. It's out of this. Okay?

10 MR. BODE: In terms of Marshal Rosado,  
11 your Honor, that's the only thing I can address as to him  
12 in terms of his interactions.

13 THE COURT: So you --

14 MR. BODE: I would like to address some of the  
15 other things but we'll do that at a later point.

16 THE COURT: It is my impression and I will be  
17 perfectly candid with you, Mr. Bode, that if we get past  
18 this exhaustion issue, that the Court is going to be  
19 inclined, and this is my intention, I am going to either  
20 go -- I am going to go to the source, okay? That's my  
21 aim. I am not going to, you know, take a proffer. I  
22 think that the Court's responsibility in this regard,  
23 given the severity of the confinement is to go to the  
24 source.

25 MR. BODE: And as I said --

**Proceedings**

1           THE COURT: Now that may not mean that  
2 necessarily Mr. Merer's going to get a chance to cross-  
3 examine. It may be that we do that ex parte if I am  
4 convinced that the risk of threat and death to the  
5 witness is such that I can't take the -- you know, I  
6 can't make him available publicly or her, whoever it  
7 might be.

8           MR. BODE: And as I said at the very outset  
9 before Mr. Merer even spoke, you know, I had other folks  
10 present. Agent Cox was present. I have to check, there  
11 may be a witness or two that we were not aware of but  
12 there's plenty on the threat that we could use if we were  
13 going forward as discussed with Judge Seybert, but if  
14 we're going forward with something else, I will roll with  
15 it.

16           What counsel had proposed at the last  
17 proceeding was I think an agent testifying without names  
18 but if it's something ex parte, I will deal with it,  
19 Judge. I don't need Marshal Rosado for that. So in  
20 terms of that aspect of it, I think counsel and I are on  
21 the same page.

22           THE COURT: All right. So I mean obviously if  
23 things change, then you know we run the risk that at some  
24 point in the middle of this, we find out that I can't  
25 proceed, I don't know. I just don't -- I certainly want

**Proceedings**

1 to put anybody through that situation but on the other  
2 hand, Mr. Merer's expressed a desire to move this matter  
3 forward.

4 MR. BODE: And --

5 THE COURT: And I am thinking right --

6 MR. BODE: That's the aspect I would like to  
7 address now, if I might and respond to his comments.

8 THE COURT: Okay.

9 MR. BODE: This is an engineered crisis by the  
10 defense. He's expressed a desire to move but it's a  
11 desire only. The letters that I handed out that he said  
12 Mr. Bode just gave me a letter were letters that were  
13 sent to Mr. Merer back in November. When Mr. Merer  
14 cross-examined the attorney -- the staff attorney from  
15 the Bureau of Prisons who was the newly assigned staff  
16 attorney about all his letters that were supposedly  
17 unanswered, he didn't hand up to the Court, we didn't  
18 discuss the fact that they had been responding to his  
19 letters but by the prior staff attorney. So I wanted to  
20 hand those up to the Court.

21 It's my understanding that the Bureau of  
22 Prisons is also preparing responses for the Court and/or  
23 counsel that they indicated they would get in later this  
24 week regarding some of the new claims being raised in the  
25 last week or so. But I wanted to proffer these to the

**Proceedings**

1 Court.

2 Obviously we first need to reach the question  
3 of administrative remedies and I would note in the letter  
4 of November 13, the staff attorney at that time discussed  
5 how to begin this administrative remedy process, gave his  
6 number, gave his extension, should Mr. Merer wish to --  
7 wish assistance in that process.

8 What's happened is the defense has refused to  
9 avail themselves of that process on purpose because  
10 they're trying to engineer a crisis here, I submit. And  
11 that's the letter I just gave counsel. It's actually a  
12 letter that counsel had not provided at the prior  
13 hearing, that had been left out in his cross-examination  
14 of the -- Ms. McFarland. And I thought I should call the  
15 Court's attention to that because I was very surprised to  
16 learn of these letters, obviously, when I was -- received  
17 them.

18 THE COURT: All right. But let me just ask a  
19 couple of questions and as I said, I --

20 MR. MERER: Your Honor?

21 THE COURT: -- don't have the same familiarity  
22 with the record as you do but --

23 MR. MERER: Your Honor?

24 THE COURT: Yes.

25 MR. MERER: I am sorry to interrupt.

**Proceedings**

1 THE COURT: Go ahead.

2 MR. MERER: And I really don't want to get into  
3 a tit for tat. I just want to very briefly point out  
4 something. I am just looking at the letters that  
5 Mr. Bode gave me, everything in these letters is  
6 absolutely true. I did make inquiries as to how  
7 Mr. Patino's Colombian lawyer can visit. The staff at  
8 MDC was very courteous about that. I made inquiries  
9 about how to do a lie detector test. They were courteous  
10 about that. How to make social calls. All of this  
11 stuff is fine.

12 That wasn't the basis of any my complaints. I  
13 didn't see the need to complain about things that they  
14 were doing. It was the things that they weren't doing  
15 that was the problem. The things that were causing him  
16 extreme discomfort, the things that were interfering with  
17 his right to counsel; that was what existed.

18 So what Mr. Bode is just saying is absolutely  
19 true. They were very cordial, very nice about the stuff.  
20 It's the important stuff that we're objecting to.

21 Secondly, I just feel obliged to point out that  
22 on page 87 of the transcript, Mr. Bode says:

23 "Mr. Bode: Agent Rosado is the agent in charge  
24 of the threat assessment."

25 This is a quote.

**Proceedings**

1           "Mr. Bode: He hadn't shared that with me but  
2 when I've spoken to witnesses who I believe have  
3 information as to the threat, I have asked him to come  
4 along to be able to listen in as to these witnesses.  
5 That's his job."

6           That's why I believe Agent Rosado wasn't  
7 proactive. That he simply was there to observe. I  
8 didn't have the opportunity, but I believe it's elsewhere  
9 in the transcript where Mr. Bode describes Agent --  
10 Marshal Rosado, excuse me, his participation in that way.

11           THE COURT: All right. Let me just start with  
12 this process that the Bureau of Prisons has with respect  
13 to the administrative segregation. One of the issues I  
14 noted raised by Mr. Merer is that the notice of  
15 administrative segregation which is supposed to spell  
16 out, according to the rules and regulations, the  
17 rationale for the segregation. That document, I don't  
18 remember the number of it, was supposed to be delivered  
19 within a 24-hour basis and set forth the reasons.

20           The first complaint is that it's deficient.  
21 The second issue that -- speaking to the exhaustion  
22 question, is that the regular, routine review that the  
23 regulations require, I've looked at the transcript of the  
24 prison official McFarland that was here, I must tell you,  
25 she seemed not to know very much about how this process

**Proceedings**

1 went, if that's why you're relying on to argue that the  
2 administrative exhaustion, you know, has sufficed or was  
3 available, then that's sure deficient.

4 MR. BODE: Well let me say, your Honor, we  
5 didn't know we were having a hearing until the judge said  
6 call your witness.

7 THE COURT: Okay.

8 MR. BODE: And I really wasn't sure if she was  
9 talking to Mr. Merer or me but I brought the attorney  
10 from the BOP -- from MDC all the way here to try and  
11 answer what I thought, and what I told her, was the -- I  
12 thought was actually some of the other issues that I  
13 couldn't really address; the telephone and things like  
14 that.

15 My understanding is she wasn't the staff  
16 attorney for the past few months. She's been recently on  
17 this and I note the letters; previously it was  
18 Mr. Johnson who was dealing with this. So I asked her if  
19 she would look into that for the Court.

20 My understanding is if she didn't send it out,  
21 she was sending it out very recently, this week, letters  
22 to counsel regarding some of these matters and I know she  
23 was preparing a letter for the Court. I told her once I  
24 appeared here today, you know, we could kind of figure  
25 out in terms of scheduling and everything, I would -- you

**Proceedings**

1 know, she should probably direct those to your Honor, as  
2 well.

3 THE COURT: But, Mr. Bode, this is like many  
4 moons since the complaints were made. I mean, you know,  
5 the fact is that --

6 MR. BODE: Well let me say, your Honor --

7 THE COURT: -- this supports Mr. Merer's  
8 argument that it's taken judicial review to get the  
9 Bureau of Prisons to do some of the things they should  
10 have been doing.

11 MR. BODE: They haven't even started the  
12 process, Judge. They refused to start the process.

13 THE COURT: Well you say they haven't started  
14 the process but there's no doubt that there's a number of  
15 letters, correspondence, back and forth, trying to  
16 address even some of the smaller issues without  
17 resolution.

18 MR. BODE: Frankly, your Honor, if counsel is  
19 not -- in the letter of November 24 -- actually, November  
20 13, which is just days later, they outline where to go to  
21 look at the administrative -- where the remedy process  
22 is. You know, the regulations permit attorneys to assist  
23 inmates in filing the paperwork. The inmates have to  
24 sign them.

25 THE COURT: Well hold on. Let's not mix apples



**Proceedings**

1 and oranges.

2 MR. BODE: And gives the number --

3 THE COURT: Okay? Apples and oranges in my  
4 opinion; the apples here are the obligations of the  
5 Bureau of Prisons to follow the regulations with respect  
6 to administrative segregation. That is the rules are set  
7 forth in a very clear fashion. There are specific  
8 timetables that the Bureau of Prisons is supposed to  
9 follow with respect to administrative segregation.  
10 There's monthly review that's supposed to occur.

11 MR. BODE: And I have asked --

12 THE COURT: And I am not sure that any of that  
13 has happened.

14 MR. BODE: No. And I have asked them to -- I  
15 have asked her to familiarize herself with those things,  
16 so that it can be addressed with the Court.

17 THE COURT: Okay. So that's --

18 MR. BODE: But --

19 THE COURT: -- the apple in this case. The  
20 oranges might be the other issues, you know, the thermal  
21 underwear and whether or not you know he used the right  
22 form for complaining about thermal underwear. But I  
23 don't want to like blend all of these problems together,  
24 I mean --

25 MR. BODE: Well, the administrative remedy

**Proceedings**

1 process is for resolving both types of things. I mean it  
2 should be a different -- obviously a different letter in  
3 terms of the content, the substance of it. But it's --  
4 the process isn't the same.

5 And if Patino had availed himself of this, if  
6 counsel simply weren't trying to engineer this into a  
7 crisis, we would frankly be done with this process  
8 already. He received this letter in November, did  
9 nothing and --

10 THE COURT: What do you mean by that? You  
11 know, is there any question in the Bureau of Prisons'  
12 mind that he's complaining about administrative  
13 segregation?

14 MR. BODE: Well --

15 THE COURT: And what's been done about that?

16 MR. BODE: Judge, I submit there is -- you have  
17 to submit -- the way the Bureau of Prisons -- I mean it's  
18 tough, your Honor. I am here --

19 THE COURT: Yes.

20 MR. BODE: This was referred. It was on for a  
21 status today and not a hearing, so I don't have someone  
22 from BOP here to address this. So I can talk to it --  
23 talk at it as best as I can.

24 THE COURT: Then here's what I would recommend,  
25 okay? You're not prepared to answer these questions but

**Proceedings**

1 these are the questions the Court has.

2 MR. BODE: I asked them to look at this since  
3 we were on a few days ago and I have asked them to look  
4 at this and, you know, after -- the first thing they were  
5 able to locate was the initial notices for each defendant  
6 which defendants had claimed they had never received. So  
7 that was the starting place.

8 THE COURT: All right. So here's my plan.  
9 First I needed to resolve this question of whether or not  
10 I can remain on this case. I'm satisfied now that both  
11 sides want me to continue with this case for whatever  
12 reasons. They feel that this is going to be -- that  
13 Marshal Rosado is not going to present a problem to my  
14 participation in this case. If that changes, you'll let  
15 me know.

16 Secondly, I didn't expect that we would  
17 undertake an evidentiary hearing starting today because I  
18 wasn't sure if I was going to be on this case and I  
19 haven't fully reviewed the entire record that's been  
20 developed up to this point. Thanks to Mr. Merer, I have  
21 at least a chronology that I can focus on and I am going  
22 to do that. If you want to submit something, Mr. Bode,  
23 you --

24 MR. BODE: Yes. And if I could just take a  
25 look at what he handed up --

**Proceedings**

1 THE COURT: Of course.

2 MR. BODE: -- just to make sure I have it all  
3 before -- at the end of the proceeding is fine.

4 MR. MERER: Judge, may I just --

5 THE COURT: Yes, hold on. Let me just finish.  
6 And then I want to -- today, I think there's no question  
7 that we could at least address the smaller -- the tail of  
8 this, which is the Long Island designatio. I think  
9 that's a very small component of this. We should be able  
10 to resolve that today.

11 But I am very interested, first of all,  
12 Mr. Bode, in the -- you know, you rely heavily on the  
13 Prison Law Reform Act, the "PLRA" as a basis for arguing  
14 administrative exhaustion. The case law makes clear that  
15 there's another avenue for challenging conditions of  
16 confinement and I believe -- you know, it's clear that  
17 that's the vehicle that's being used to challenge the  
18 conditions of confinement here, that is the habeas  
19 process, which doesn't -- you know, doesn't address  
20 statutory exhaustion. It's a different form of  
21 exhaustion. It's what the Courts have described as  
22 judicial exhaustion.

23 And it seems to me that to the extent that I  
24 have read the case law on this and again, I've read the  
25 Basciano case and the Bell case and some of the others is

**Proceedings**

1 Judge Irizarry's case, that the Courts jump in. That is  
2 Judge Block's case, as well. And then that is that to  
3 the extent that the Court has a concern that  
4 constitutional issues impinging on liberty interests are  
5 involved, that the Court's going to jump in and assure  
6 itself that there is a sufficient basis for it and that  
7 it's not punitive.

8           So I throw that out to you, just to give you  
9 the head's up of what my review of the case law reveals.  
10 So you need to move off of the PLRA and start focusing on  
11 the habeas aspect of this in order to -- if you want to  
12 approach this, you know, on the law, then that's the law  
13 that you have got to be considering. So that's number  
14 one.

15           Number two, is that even if we focus on the  
16 habeas component of this, as I have said, the Courts have  
17 said there's still some element of judicial exhaustion  
18 that's involved. I'm not clear what judicial exhaustion  
19 consists of. The one thing that I do know from the  
20 regulations is that the -- independent of whatever  
21 obligation the defendant has to pursue administrative  
22 remedies, the Bureau of Prison has its own obligations  
23 when it comes to this kind of segregation. And I don't  
24 know and the record seems to indicate that -- and again,  
25 I don't have a firm answer on this but it looks like the

**Proceedings**

1 Bureau of Prison dropped the ball and they haven't done  
2 what they're supposed to be doing under the regulations  
3 which would in my mind, satisfy the judicial exhaustion  
4 issue.

5           So that's where I am headed. If the record is  
6 not complete and you need to add more to disabuse the  
7 Court of that notion, that's fine. I am also concerned  
8 about this idea that you know, if you don't file the  
9 right form, you don't get the review. There's no  
10 question that this defendant's been complaining about  
11 segregation and I am not going to exalt form over  
12 substance. So that's another aspect of this.

13           In any event, those are my thoughts. You can  
14 address them as you see fit. I don't expect you to  
15 address them today but that's the kind of the world of  
16 ideas I am living in right now.

17           MR. BODE: And, let me say, I've obviously got  
18 similar thoughts in terms of your Honor, in terms of what  
19 I am pursuing because although I submit they haven't even  
20 tried administratively. And the BP-8 is an informal  
21 complaint. They haven't even -- they need to do the BP-9  
22 which I have set forth in my letter. We've given them a  
23 copy of. You know, there's -- besides the whole issue in  
24 terms of the special housing unit, all these others  
25 issues, they're not attempting any of those other issues

**Proceedings**

1 either.

2           You know, I submit it's beyond question that  
3 long underwear is an administrative question and they're  
4 not -- they would rather not engage that process.

5           THE COURT: I ultimately think that the long  
6 underwear is going to be a problem that we can resolve  
7 with no problem.

8           MR. BODE: I submit we can, Judge.

9           THE COURT: Okay.

10          MR. BODE: In terms of the BOP regulations,  
11 obviously the -- as I indicated, you know, my reading of  
12 the PLRA, I submit is a little different in terms of what  
13 went on and what Judge Irizarry found in Kahn (phonetic).  
14 But be that as it may, I have already spoken with the  
15 BOP.

16          The first order of business, had they even  
17 received a notice, they both claimed under oath they  
18 hadn't. We've shown they have. Well, I will bring in  
19 the officers, if need be, who gave it to him but now I  
20 will also, you know, speak with the BOP about that  
21 further administrative process; the monthly reviews, et  
22 cetera.

23          THE COURT: Again --

24          MR. BODE: I can't speak to it off the cuff.  
25 But I will --

**Proceedings**

1           THE COURT: I just want to make clear, I am not  
2 trying to, you know, bypass the rules. You know, to the  
3 extent that the plaintiff wants -- the petitioner here  
4 wants, you know, toothpaste, he's going to have to file  
5 the form or the request. I am not going to allow  
6 somebody to jump at the Court every time they need  
7 toothpaste.

8           On the other hand, to the extent that  
9 constitutional liberty issues are raised and significant  
10 interference is occurring with the right to counsel,  
11 that's the kind of question that the Courts do jump into  
12 when they feel that the circumstances warrant.

13           MR. BODE: Yes. And, you know, I would note --

14           THE COURT: And that's what's raised here.

15           MR. BODE: Yes. And I would note that the --  
16 way back in November, that the BOP was already dealing  
17 with that issue. When I spoke to Ms. McFarland, I think  
18 it was yesterday or the day before, she was having all  
19 the logs pulled and everything pulled, so that we can try  
20 and get to the bottom of those things. You know, I think  
21 she -- because she wasn't the attorney originally on  
22 this, she's not as familiar with the older stuff.

23           THE COURT: All right. I got it.

24           MR. BODE: So, she's familiarizing herself now.

25           THE COURT: Okay.



**Proceedings**

1 MR. BODE: So, I know she is looking for the  
2 opportunity to assist the Court in answering those  
3 questions.

4 THE COURT: All right. So that's the universe  
5 of ideas. And we're going to -- you know, when -- I will  
6 give you a date when we'll actually physically start this  
7 process. I want to look through all of the paperwork. I  
8 haven't had that -- I've clearly started the process but  
9 I am not ended. It hasn't finished.

10 MR. MERER: May I?

11 THE COURT: Yes, Mr. Merer.

12 MR. MERER: Just briefly, your Honor.

13 THE COURT: Yes.

14 MR. MERER: In the interest of judicial  
15 economy, and also as it relates to Mr. Patino's rights,  
16 all of these other issues that Mr. Bode just spoke about  
17 that should not come to the Court's attention and the  
18 Court said obviously they shouldn't, all of them are  
19 because he's in the SHU; and has the thermal underwear,  
20 the lack of calls and so on.

21 THE COURT: Yes.

22 MR. MERER: So, the SHU is the issue.  
23 Secondly, as we have expressed, we need to proceed  
24 expeditiously. Mr. Bode is free to bring whatever  
25 witnesses he wants but I truly don't see the point of him

**Proceedings**

1 bringing in witnesses such as Ms. McFarland or personnel  
2 from the BOP to testify as to what did or did not happen.

3 I will tell you that up until the point where  
4 we filed this latest round of motions, I personally  
5 requested of many lieutenants and other correctional  
6 officers, that Mr. Patino receive his BP-8, HIS BP-9 and  
7 start the process.

8 I was always told in a very nice way, no  
9 problem. But there was a problem; he didn't get it. Now  
10 once that happened, I instructed Mr. Patino not to file  
11 anything because Id ont' want to get caught up in that  
12 morass because despite what Ms. McFarland testified as to  
13 the 20 days in the decision and then it goes another 20  
14 days and it goes to regional, I know from bitter  
15 experience that these things go on for years because  
16 there's a thing called adjournments, just like there are  
17 in court.

18 So I don't see the need for BOP to come in if  
19 we get over the threshold issue of whether or not the  
20 administrative remedies need to be exhausted because then  
21 it's moot.

22 THE COURT: Yes.

23 MR. MERER: I think what we really should do  
24 and I am in total accord with your Honor about going to  
25 the issues that we can resolve today, is get to the

**Proceedings**

1 issues. Now Mr. Bode may want to bring in his witnesses  
2 or your Honor may make a determination as to how those  
3 witnesses will be dealt with. I have made some  
4 suggestions that I think you might have seen in my  
5 transcript.

6           Nevertheless, that has to happen another day, I  
7 hope soon. But the issue as to the related case, the  
8 issue as to how we're going to proceed, whether we have  
9 to bring in these BOP people which is really nothing to  
10 do with the underlying issue, I think we can resolve  
11 today. I don't see why this whole three-headed motion  
12 can't be resolved today and at the next appearance which  
13 will hopefully be in the near future.

14           THE COURT: Well but Mr. Merer, don't you  
15 acknowledge that, you know, clearly the government has  
16 not waived the exhaustion issue.

17           MR. MERER: Clearly.

18           THE COURT: And clearly the case law says that  
19 there is this aspect of judicial exhaustion and an  
20 element of reviewing whether or not the judicial  
21 exhaustion element has been made, involves some review of  
22 what's happened up to now.

23           MR. MERER: Okay. Your Honor, then I will just  
24 ask -- well I am sure the Court will have no problem with  
25 that. I did not include in my packet my letters to MDC

**Proceedings**

1 which I referred to in my cross-examination of Ms.  
2 McFarland.

3 THE COURT: Yes.

4 MR. MERER: I will submit them to the Court.

5 THE COURT: You need to do that.

6 MR. MERER: Yes, I will.

7 THE COURT: That's clearly what I am referring  
8 to.

9 MR. MERER: And again, just so we can move  
10 quickly --

11 THE COURT: Right.

12 MR. MERER: -- I have no issues with the two  
13 letters that Mr. Bode gave me today.

14 THE COURT: All right.

15 MR. MERER: These are things that BOP did  
16 right.

17 THE COURT: Okay.

18 MR. MERER: It's the problems that we're  
19 talking about.

20 THE COURT: Okay.

21 MR. MERER: Finally, I just want to point out,  
22 your Honor, and I just can't let this pass, not only do  
23 we say that BOP dropped the ball, we say that they're  
24 totally misleading the Court. This, I suppose it's a  
25 review, two of which are attached to Mr. Bode's last

**Proceedings**

1 submission by lieutenants who supposedly were to give  
2 this to Mr. Patino or at least to counsel, were never  
3 given to him or to myself.

4 But nevertheless, it's interesting to note that  
5 the first one is dated October 29 at 9:30 in the evening.  
6 That's the day after Mr. Patino arrived at MDC. And, "It  
7 is this office's decision" -- and this is just  
8 boilerplate because it appears in all of these decisions,  
9 whether it's in his case or not, "It's this office's  
10 decision based on the circumstances that the inmate's  
11 presence poses a serious threat to life, property, self,  
12 staff, other inmates or security or orderly running of  
13 the institution." That is simply boilerplate, taken out  
14 of the administrative -- the applicable administrative  
15 code.

16 I can tell you that whatever information BOP  
17 had came from the marshal. This is the day after he went  
18 to SHU, which is the only place he's ever been.

19 THE COURT: Yes.

20 MR. MERER: And whatever information the  
21 marshal got came from the United States Attorney's  
22 Office. Nevertheless, on October 24, Mr. Bode's letter  
23 to the Court states that not only is he now in the case  
24 and AUSA Klapper and Agent Viola are no longer assigned  
25 to the case, he says, "to the extent that we seek to

**Proceedings**

1 direct the Bureau of Prisons to make certain findings as  
2 to threat assessment in housing, that's premature." If  
3 BOP requested threat assessment from the government, such  
4 evaluation will be made by Mr. Bode or his superiors.

5 Now that's disingenuous, your Honor. He is  
6 saying if they do, when in fact, it had already been made  
7 by Ms. Klapper because she told me it had been made. And  
8 I represent that as an officer of the Court. And that's  
9 why three weeks earlier I had that motion to  
10 Judge Seybert.

11 THE COURT: All right.

12 MR. MERER: So this is a process that was  
13 locked in place and everybody is in lock step with the  
14 process locked in place. And that brings us here and I  
15 don't see the need to waste time once your Honor is  
16 satisfied, if your Honor is satisfied, that we get past  
17 that exhaustion problem.

18 THE COURT: Well I am very close to that. I do  
19 think thought that I need to give the government, to the  
20 extent that they still want to argue the point, the  
21 opportunity to present what they think I need to consider  
22 but I mean that seems -- I am not going to prevent them  
23 from doing that but I am very much aware that that  
24 initial review had to -- the information for that initial  
25 review of the Bureau of Prisons had to have come from the

**Proceedings**

1 United States attorney and the investigative --

2 MR. MERER: Yes.

3 THE COURT: -- you know, the investigator.

4 MR. MERER: And along those lines, your Honor,  
5 you were just discussing with Mr. Bode, the  
6 investigations that took place. One of the things that I  
7 found particularly disturbing from the get go is that  
8 AUSA Klapper totally ignored the allegations of the  
9 extortion against Agent Viola, flat out told me it was  
10 impossible and never, never did anything to investigate  
11 that. They may have paid lip service to it, your Honor,  
12 but the only people that are investigating that is the  
13 Office of Investigations of Homeland Security. They're  
14 actively investigating it.

15 And one other thing that Mr. Bode says is  
16 factually incorrect. There were dual investigations; one  
17 in Bogota and the one I just referred to out of  
18 Washington. The one in Bogota, frankly, is a he said, he  
19 said situation. Someone says they gave Agent Viola  
20 money. Someone else says they didn't. So it's not  
21 surprising that that is not merely as weighty as the  
22 investigation here which has been going on quite  
23 seriously for over a year, I can tell you that.

24 That investigation which was recently dropped  
25 was conducted by a prosecutor who came to Washington --

**Proceedings**

1 to Miami and spoke to Agent Viola. Her trip was paid for  
2 by ICE. She spoke to Agent Viola. She took his  
3 affidavit. We have a copy of that.

4 She also went to the jail and spoke to the two  
5 people, the two original witnesses who made the threat  
6 allegation against Mr. Patino that landed him in the SHU  
7 in the first place. Mr. Bode says these agents --  
8 there's other witnesses since then. We shall see.

9 Of those two witnesses, she took their  
10 affidavits, as well. One of them indeed says yes, there  
11 was a threat made. Interesting to note that his attorney  
12 has a client in this case -- in Mr. Patino's case, who is  
13 I believe cooperating.

14 The second witness said I don't know anything  
15 about it. And the affidavit was ended.

16 Then apparently there was an amendment to the  
17 affidavit in which he says I recollect now everything and  
18 he proceeds to say exactly what the first witness says.  
19 Interestingly enough, his attorney is no longer present.  
20 So I don't know the circumstances of that.

21 However we've submitted to the Court the  
22 psychological evaluation of that second witness who was  
23 kept in isolation in Combe (phonetic) because he tried to  
24 kill himself and attacked other inmates. His son and his  
25 father committed suicide. He's got serious problems.



**Proceedings**

1 He's on serious medication. The side effects of which I  
2 have included in my package, your Honor, so you can see  
3 that both being on the medication and/or the withdrawal  
4 from the medication creates mental instability.

5 Those were the two witnesses that the  
6 government relied upon to put Mr. Patino in the SHU.  
7 Since then, and Mr. Bode incredibly to me says there's  
8 still witnesses we haven't spoken to which alarms me  
9 because I want to move quickly, so I would ask the Court  
10 to direct the government that if they have witnesses, to  
11 speak to them or to follow the Court's direction as to  
12 the procedure to be followed immediately. We can't waste  
13 any more time. It's simply not right.

14 MR. BODE: I am not going to discuss with  
15 counsel the -- where witnesses are or what they might be  
16 doing and how we're proceeding. You know, if we get to a  
17 point where I have to show the threat's real, I have no  
18 doubt I can do that and I will do it with as many  
19 witnesses as I need.

20 THE COURT: Well I guess the point is that you  
21 should not be caught by surprise if I turn to you and I  
22 say okay, I am ready to hear from the witnesses.

23 MR. BODE: Well and that's why, you know, (1) I  
24 would like to -- you know, I am -- I still think that --  
25 you know, that the defense has to make some effort here

**Proceedings**

1    whatsoever and I submit they have engineered this into a  
2    crisis.  He's instructed his client not to file the  
3    administrative review.

4               THE COURT:  Mr. Bode, I guess you're not  
5    getting my point.  I think you're hanging on by your  
6    fingernails on that issue.  So you know, the point is you  
7    can still cling to it.

8               MR. BODE:  Well, no --

9               THE COURT:  You may be able to, you know -- you  
10   may be able to convince me otherwise but I am very  
11   inclined to --

12              MR. BODE:  I seek to.

13              THE COURT:  What?

14              MR. BODE:  I seek to.

15              THE COURT:  Okay.  But I am very inclined to  
16   review this because of the concern I have as the Court  
17   for the constitutional issues that have been raised.

18              MR. BODE:  I guess I am just a little shocked  
19   in terms of counsel's basically repeating what he said at  
20   the last hearing that he has instructed his client not to  
21   pursue the review process in essence because he thinks  
22   they all take too long, et cetera.  And there's a review  
23   process that was outlined, you know, three, four months  
24   ago.

25              But moving -- aside from that, which you know,

**Proceedings**

1 I obviously --

2 THE COURT: The administrative segregation is a  
3 very extreme form of segregation which is why the Court's  
4 become concerned about it. And you know, courts being  
5 courts, they want to make sure that things are fair.

6 MR. BODE: I totally understand, your Honor.

7 THE COURT: And so that's why they jump in and  
8 examine these questions to make sure that there is some  
9 review of the process, especially when you have  
10 allegations as exist in this case, whether they're  
11 baseless or not, who knows. I don't have a judgment yet  
12 on that issue.

13 But allegations that the information that  
14 resulted in the defendant being segregated in this  
15 fashion came from people who have an axe to grind. You  
16 know who -- not only an axe to grind, are corrupt.  
17 That's the allegation that Agent Viola is corrupt and has  
18 corrupted the process.

19 So once allegations of that type are made, it  
20 seems that, you know, especially when it's clear that the  
21 Bureau of Prisons is going to rely on the allegations of  
22 that agent to do its threat assessment, then it almost  
23 leaves the Court with no choice but to take a look at it.

24 MR. BODE: Well I submit in the absence of  
25 threat frankly, that special housing would be the

**Proceedings**

1 appropriate place to house Mr. Patino given his history,  
2 given his resources.

3 THE COURT: Okay.

4 MR. BODE: But that's a road that we may go  
5 down.

6 THE COURT: But you have illicit -- you have  
7 made clear that the reason why he's in the SHU is because  
8 of the threats. That was the principle reason that the  
9 government says is the basis for him being there, at  
10 least --

11 MR. BODE: Well actually that's -- what I said  
12 in my letter, your Honor --

13 THE COURT: Yes.

14 MR. BODE: -- turning to paragraph 2, was  
15 twofold.

16 THE COURT: Yes, there's a separate --

17 MR. BODE: (1) the conspiracy and (2) that  
18 destabilizing effect he would have in a general prison  
19 population --

20 THE COURT: Right.

21 MR. BODE: -- where he has access to all of  
22 these other inmates, in essence, to do his bidding and  
23 that aspect of it as well and I don't --

24 THE COURT: That's a -- you know, and maybe  
25 there's more to this than that but that seems like such a

**Proceedings**

1 generic statement that it basically had no impact on me  
2 at all. But that doesn't mean there's nothing to it.

3 MR. BODE: Oh, no.

4 THE COURT: You can say that about any  
5 prisoner.

6 MR. BODE: Well I submit Mr. Patino is not any  
7 prisoner in terms of, you know, he's a -- not to be glib,  
8 you know, he's a multi-million dollar murderer. He has  
9 access to money. He has demonstrated in the past his --

10 THE COURT: Look, I don't want to argue this  
11 point. This is -- there's no point. There are many  
12 prisoners who have access and clout and who, if that were  
13 the criteria, would be in the SHU. That is, their  
14 ability to circulate amongst the population and influence  
15 other prisoners to do their bidding, you know, that can  
16 be said about a great number of prisoners.

17 MR. BODE: And, you know, I will -- if I have  
18 the opportunity, you know, I may seek to put in evidence  
19 in terms of his threats in the Colombia, et cetera.

20 THE COURT: Okay.

21 MR. BODE: But I guess what I would ask now,  
22 rather than simply rehashing what's gone, in terms of the  
23 prior argument, over and over again --

24 THE COURT: Yes.

25 MR. BODE: -- if we can, you know, put this

**Proceedings**

1 down, I would ask for a chance to, you know, argue. And  
2 even in terms of as your Honor indicated, besides the BOP  
3 exhaustion, the judicial exhaustion issue, and I will,  
4 you know, get BOP here to deal with that aspect of it.

5 THE COURT: You're not precluded.

6 MR. BODE: And then if we're moving on beyond  
7 that, you know --

8 THE COURT: Be ready. That's the point. And  
9 you know if we move on beyond that, you better be ready  
10 because I am not going to -- you know, we're not going to  
11 delay it another several weeks, so you can prepare. I  
12 think that what I am telling you is be prepared for the  
13 possibility, which looks like a probability now, but  
14 again I don't want you to misconstrue what I am saying.  
15 I'm just --

16 MR. BODE: No, it's just -- I just need to know  
17 in terms of if we do move on, how we're going to move on  
18 because it makes a difference. If witnesses are  
19 interviewed, you know, ex parte or in camera versus if  
20 they're --

21 THE COURT: I thought I made myself clear. If  
22 you convince me that the witnesses are in such danger  
23 that to produce them for -- in court would create such a  
24 dangerous situation for them and their families, if I am  
25 convinced of that, then I can assure you that I will take

**Proceedings**

1 that review in camera.

2 MR. BODE: Okay.

3 THE COURT: But I have to be assured of that.

4 MR. BODE: Yes, so I just want to -- need time  
5 to make -- to take precautions.

6 THE COURT: But there's at least two witnesses  
7 that the defendants know of, it seems, I mean that are no  
8 secret here that, you know, there's no such -- it doesn't  
9 seem they would warrant that kind of protection.

10 MR. BODE: Well, I still -- in terms of those  
11 witnesses, you know, I agree in terms of they've -- you  
12 know, they've in essence been outted, so-to-speak shall  
13 we say.

14 THE COURT: Right. That's a, you know --

15 MR. BODE: So, you know, in terms of those  
16 witnesses, I've got to move them. I will start that  
17 process, although I am -- in terms of my position, I  
18 don't change my position. But obviously I am going to  
19 get ready, Judge. You don't have to tell me to get ready  
20 for a hearing.

21 THE COURT: No, okay.

22 MR. BODE: I just need to know what we're  
23 doing.

24 THE COURT: That's the only point I am making.  
25 All right.

**Proceedings**

1 MR. MERER: Judge?

2 THE COURT: Let's talk about the Long Island  
3 case designation.

4 MR. MERER: Wait, your Honor.

5 THE COURT: Yes.

6 MR. MERER: I'm sorry. Again, I apologize but  
7 Mr. Bode said again something I just want to briefly  
8 respond to. This argument that he just discussed in this  
9 paragraph 2 about the destabilizing effect on the  
10 calculation, I don't believe this was referred to  
11 your Honor. This is Judge Seybert's -- a letter to  
12 Judge Seybert regarding the lead defendant in this case,  
13 Luis -- Mr. Gomez Bustamante. Books have been written  
14 about this fellow. His nickname is "Rasguno". There's a  
15 tella novella about him. He has supposedly has killed  
16 many, many hundreds of people.

17 AUSA Klapper wrote a very well-written  
18 exhaustive ten-paged document to Judge Seybert as to why  
19 he would have a destabilizing effect in the population.

20 THE COURT: Bustamante.

21 THE COURT: Mr. Bustamante, the lead defendant  
22 in this case. Mr. Bustamante had been in the SHU. He  
23 had been complaining about it. It went before Judge  
24 Seybert. Lo and behold, Mr. Bustamante is now in a CTF  
25 facility, which is a private jail in Washington, D.C.,



**Proceedings**

1 which happens to house hundreds of Colombian inmates  
2 because they bring them to the District of Columbia  
3 district court on these 959 import cases.

4 He's there because the government upon  
5 information and belief accepted his cooperation. So all  
6 of the sudden those concerns don't matter.

7 There's another fellow who is even more well-  
8 know. He's known by the name of "Lollipop" or "Chupetta"  
9 (phonetic). He is again, a North Valley cartel leader  
10 and I refer to him because that will come up in the  
11 related argument case, which we're going to segue into in  
12 a moment but he not only has killed hundreds of people  
13 and has admitted it, I believe to the government, among  
14 his victims were a registered United States informant, a  
15 fellow named, I believe Patino Formecchi (phonetic), no  
16 relation here.

17 He, too, was in the SHU and on those days where  
18 I would spend my six or eight hours and my paralegal  
19 would, visiting Mr. Patino, Mr. -- his name is Juan  
20 Carlos Ramirez Abadia (phonetic), would be in the next  
21 cubicle because he would have someone come to take him  
22 out every day. He couldn't stand the segregation in an  
23 eight by six cell. He, too was kept there until  
24 magically, he's returned to general population. Why?  
25 Because he's now cooperating.

**Proceedings**

1           So clearly what the government is doing is  
2     rewarding those who cooperate and say now wait a minute,  
3     you're not cooperate, you're a bad guy, you're a threat.  
4     That's what's happening here, Judge. And it's pretty  
5     clear if you're out there dealing with the situation.

6           It's just bewildering to me that it's gone on  
7     for so long, so frequently and no one seems to have done  
8     anything about it. But in this case I feel obliged to do  
9     whatever I can do because Mr. Patino is not going to be  
10    able to prepare for what's going to be an extended trial.  
11    He simply isn't going to be able to do it in the present  
12    conditions, nor can I.

13           And having said that, your Honor, I am ready to  
14    talk about the related case motions.

15           THE COURT: All right. So let's talk about the  
16    related case. How does the designation come up?

17           MR. BODE: I am going to summarize, your Honor.  
18    I regret, I grabbed half the file. I must have left out  
19    the folder regarding -- with my prior letter about this.  
20    But to summarize our submission, these defendants are  
21    charged in two separate instruments; superseder 8 and  
22    superseder 9 respectively and I think Mr. Patino is in  
23    superseder 9 is my understanding, is what he is here  
24    before the Court on.

25           The original case as to -- was filed in 2002 as

**Proceedings**

1 to Bustamante, I believe.

2 THE COURT: Right.

3 MR. BODE: That case was -- and I apologize, I  
4 don't have it in front of me, Judge. I grabbed the wrong  
5 folders. That case was -- we summarize it in our letter,  
6 however -- that case was related to some money remitter  
7 cases which were before Judge Seybert. Prior to that,  
8 there's a chain of cases and we set it forth in the  
9 letters and I'll get those for the Court and provide  
10 them. They're just down in my office.

11 These cases had originally -- the first case  
12 had gone to Judge Seybert when she was sitting in  
13 Brooklyn.

14 MR. MERER: I'm sorry, sitting in where?

15 MR. BODE: Sitting in -- well, I don't know if  
16 she was sitting -- I think the case was a Queens case but  
17 I think Judge Seybert was sitting in Brooklyn at the  
18 time, is my understanding.

19 THE COURT: Well, when a judge -- was she --  
20 well, I don't know.

21 MR. BODE: So --

22 THE COURT: I don't think she started in '02.

23 MR. BODE: Yes. No, no, it's before that.

24 THE COURT: Okay.

25 MR. BODE: The case is before that. By '02,

**Proceedings**

1 she was out here, is my understanding.

2 THE COURT: Okay.

3 MR. BODE: So this whole chain of these related  
4 cases began with Judge Seybert and then they traveled  
5 with her when she moved out to Long Island. And that's -  
6 - and I will get those papers and get them up to the  
7 Court in terms of the specific cases. But in terms of  
8 that, that's how it -- this began. And in terms of -- so  
9 that's why it remains.

10 THE COURT: Well that's important.

11 MR. BODE: Yes.

12 THE COURT: No, I mean if the -- the argument  
13 here is that there's no Long Island nexus.

14 MR. BODE: Yes.

15 THE COURT: If the assignment was made while  
16 Judge Seybert was in Brooklyn --

17 MR. BODE: Yes.

18 THE COURT: -- it being a Queens-related case  
19 and then everything else follows from that. That's not a  
20 problem.

21 MR. BODE: And counsel's wrong in terms of the  
22 remedy. If, let's say -- I submit he's not, but if they  
23 were right, the remedy wouldn't be that it go to  
24 Brooklyn. The remedy is that it would go on the wheel  
25 amongst all the judges in the district, Brooklyn and Long

**Proceedings**

1 Island, because frankly for this case, the government  
2 need only show by statute that drugs come to the United  
3 States and then the defendant is prosecuted in the  
4 district where they land.

5 THE COURT: Well, I don't even know that that's  
6 the remedy. I mean at this point, you know, assuming  
7 these cases were properly related, this one in particular  
8 -- there's also one of reasons for these rules is to  
9 allocate judicial resources. It's to control judicial  
10 resources. You know, the fact of the matter is,  
11 Judge Seybert's been on this case since 2002 and knows  
12 this case inside out.

13 MR. BODE: Yes.

14 THE COURT: So nobody in this court is going to  
15 be jumping to throw this all on somebody else's lap  
16 unless --

17 MR. BODE: We just wanted to make sure --

18 THE COURT: -- there's very good reason for it.

19 MR. BODE: Yes, we just wanted to make sure the  
20 Court was aware in terms of it's not as if the government  
21 you know, sought out Judge Seybert. This case started --

22 THE COURT: Well that's the important component  
23 of this issue in my opinion.

24 MR. BODE: Yes.

25 THE COURT: If you basically sought

**Proceedings**

1 Judge Seybert out because you like her, then that's nice  
2 to know but it's not the right reason to place a case  
3 with somebody. Okay.

4 Where is that material though, Mr. Bode? Did  
5 you submit it?

6 MR. BODE: Well yes. No, it's filed ECF,  
7 Judge.

8 THE COURT: Okay.

9 MR. BODE: I just don't have my copies with me,  
10 so I can't give you -- I regret, I grabbed the --

11 THE COURT: When did you submit that?

12 MR. BODE: This would have been back in  
13 November or December. And what I will do is I will go  
14 get copies and have someone bring them up to the Court of  
15 those letters.

16 THE COURT: Okay.

17 MR. BODE: They're all filed ECF.

18 THE COURT: All right. I am sure I can find  
19 them if they're filed with ECF.

20 Yes, Mr. Merer?

21 MR. MERER: Yes, your Honor, it's true that  
22 Mr. Bode has made representations about linked cases and  
23 apparently the earliest case was, from my understanding,  
24 before Judge Seybert in Brooklyn and the case has  
25 followed her out, related with her when she moved out

**Proceedings**

1 here.

2 THE COURT: Okay.

3 MR. MERER: No question -- there's no argument  
4 about that.

5 THE COURT: All right.

6 MR. MERER: What there is a dispute about is  
7 some of the statements that Mr. Bode made early on about  
8 how the cases were originally linked together. He said,  
9 for instance, that the DeSoto (phonetic) case was linked  
10 to the Carpio (phonetic) case and so on. And as proof of  
11 this, this is not it, I don't have it with me either, but  
12 he put in these information sheets which I think  
13 your Honor has probably seen during her days here and in  
14 the United States Attorney's Office.

15 THE COURT: Yes.

16 MR. MERER: Basically all it is, the only thing  
17 that's pertinent to the issue is copying which cause of  
18 action arose. And that's this case here, Kings  
19 (phonetic), and then there's another one -- another  
20 information sheet copied in which cause of action arose  
21 in Queens.

22 Now what I am trying to suggest, your Honor, is  
23 that every single one of these information sheets in  
24 these four or five or six or eight linked cases, the  
25 cause of action arose in Kings or Queens which would have

**Proceedings**

1 meant that it would have brought into Brooklyn. Clearly  
2 this court has venue when the cases are --

3 THE COURT: Well actually that's not quite the  
4 rule, Mr. Merer.

5 MR. MERER: Well --

6 THE COURT: Because what the rule also provide  
7 -- the rules also provide that at the outset of the case,  
8 the case is going to go to the jurisdiction where the  
9 case arose.

10 MR. MERER: Right.

11 THE COURT: That is, the Court where the case  
12 arose and if it started out as a Brooklyn case while  
13 Judge Seybert was in Brooklyn, then that's perfectly  
14 appropriate.

15 MR. MERER: No, that's true.

16 THE COURT: Okay.

17 MR. MERER: I take no issue with that. What I  
18 was trying to --

19 THE COURT: But to the extent that subsequent  
20 cases which are developed as a result of the first case;  
21 that is either because the witnesses are the same -- and  
22 this is the case related rule, that's a very different  
23 set of rules --

24 MR. MERER: Yes.

25 THE COURT: -- as you know.



**Proceedings**

1 MR. MERER: As I know and as I have no argument  
2 with.

3 THE COURT: And it's been the subject of some  
4 sore, sore --

5 MR. MERER: Yes, it has.

6 THE COURT: -- sore discussions between the  
7 judges because when an interesting case comes up, perhaps  
8 on Long Island and then it gets referred to Brooklyn on  
9 the case related rule, everybody, you know feels like why  
10 didn't I get that case.

11 MR. MERER: And I am sure it works the other  
12 way when a particularly boring case comes along.

13 THE COURT: Of course, of course.

14 MR. MERER: But what I am trying to say,  
15 your Honor, I think upon examination, some of the  
16 linkages are actually weak. That although there may have  
17 been a person in one case that knew or at some point did  
18 some transaction with a person in another case, in and of  
19 itself, that wasn't enough because as we pointed out in  
20 our memorandum of law, simply because there's some nexus  
21 doesn't mean there's enough nexus to relate. That's one  
22 point I am trying to make.

23 The second is this, your Honor, you just said  
24 that Judge Seybert has had these cases for 15 years.  
25 Actually, I believe the Bustamente case, although it was

**Proceedings**

1 a sealed indictment -- this case was sealed in 2002, I  
2 don't believe it actually was unsealed until 2004. I may  
3 be mistaken.

4           Nevertheless, yes, she's had these cases but I  
5 point out not one of them has gone to trial. So she's  
6 had them to the extent where they're have been either  
7 pleas or cooperation agreements and sentencing or many of  
8 them ongoing cooperations and not sentencing. So there's  
9 not been the exposure to Judge Seybert and her chambers  
10 and staff of discovery.

11           THE COURT: I think she would disagree with  
12 you.

13           MR. MERER: Well, maybe; okay. But in any  
14 event, it hasn't gone to trial, your Honor.

15           THE COURT: Yes.

16           MR. MERER: And what I am trying to say is this  
17 case that has been referred to by the government, that  
18 Ms. Klapper frequently referred to as the North Valley  
19 Cartel case is simply a law enforcement term as  
20 your Honor is aware. There's no membership cards.  
21 There's no admission process or dues paying to this  
22 organization. It's a law enforcement term collectively  
23 used to apply to people who from a certain area may be  
24 doing drug business; just as it was used in the Calle  
25 Cartel and the Medajin Cartel. And those cases were all

**Proceedings**

1 over the country depending on the district where the  
2 cause of action arose.

3 Mr. Patino's contact, not only with people in  
4 this case but particularly with people in the preceding  
5 cases is absolutely nil. The facts in his case have  
6 nothing to do with the experience or the factors or the  
7 facts that Judge Seybert has dealt with.

8 THE COURT: All right.

9 MR. MERER: So he --

10 THE COURT: I have an answer to this question  
11 and I think --

12 MR. MERER: I have a few more points and then I  
13 will --

14 THE COURT: It's not going to be helpful.

15 MR. MERER: Well --

16 THE COURT: I can tell you this.

17 MR. MERER: The other -- one of the other --

18 THE COURT: Let me just stop you there,

19 Mr. Merer on this question --

20 MR. MERER: Yes.

21 THE COURT: -- because it seems to me very  
22 clear, this case was properly referred to Judge Seybert  
23 while she sat in Brooklyn. There seems to be no question  
24 about that.

25 MR. MERER: Not this case, your Honor, the

**Proceedings**

1 preceding case.

2 THE COURT: I mean the original case.

3 MR. MERER: Not the --

4 THE COURT: The 02 case.

5 MR. MERER: No, I don't --

6 THE COURT: I thought that was the 02-cr-1188.

7 MR. MERER: I believe that Judge Seybert was  
8 out here at that point.

9 MR. BODE: What the 02 case related to a series  
10 of money remitter cases, though if you go back to the  
11 first of those cases, it went to Judge Seybert in the  
12 '90s in Brooklyn.

13 THE COURT: In the '90s.

14 MR. BODE: In the '90s.

15 MR. MERER: Yes, just --

16 MR. BODE: Some time in the '90s; yes.

17 THE COURT: Okay.

18 MR. MERER: She was here, I believe when this  
19 case went to her.

20 THE COURT: When the 02 case was started.

21 MR. MERER: Yes, and that is one of the basis  
22 upon which I am saying we -- although -- even though  
23 there's been -- I believe Mr. Patino is defendant number  
24 24 or 28 and there's more to come, just by the fact that  
25 no one else has raised the issue before him doesn't

**Proceedings**

1 preclude him from objecting to that fact, I think,  
2 That's my position.

3 But moreover, your Honor, what we do allege is  
4 that during the period of time where AUSA Klapper stopped  
5 working out of the Brooklyn office and was assigned to  
6 the Long Island office, an inordinate amount of her cases  
7 suddenly appeared under the related case doctrine in Long  
8 Island including this case at that time. Now she's back  
9 in Brooklyn, that's true. But I am talking about during  
10 that time period and I believe this is one of them.

11 Furthermore, your Honor, if we're talking about  
12 judicial economy, this case was originally scheduled for  
13 this morning at 9:30 before Judge Seybert. Then we  
14 received the change to come before your Honor at 10:30.  
15 When I went down at 10 o'clock the marshals, I was  
16 informed that Mr. Patino hasn't been here. I said, gee,  
17 what would have happened had he been due before  
18 Judge Seybert and the marshals said well, impossible and  
19 we would have informed chambers.

20 So if and when this case goes to trial, you've  
21 got this transportation problem. When Mr. Patino and  
22 this is again in my pleadings, when his --

23 THE COURT: Mr. Merer, please.

24 MR. MERER: I will get -- then I will cut to  
25 the real problem here, your Honor.

**Proceedings**

1 THE COURT: Okay.

2 MR. MERER: The real problem is this and this  
3 is --

4 THE COURT: You're just going to have to get a  
5 hotel out here if --

6 MR. MERER: Actually --

7 THE COURT: -- which is where I think is really  
8 going.

9 MR. MERER: I was thinking of buying a house,  
10 but whatever, because it may be an extended trial.

11 THE COURT: Okay.

12 MR. MERER: But, Judge?

13 THE COURT: yes.

14 MR. MERER: This article is in the papers that  
15 I --

16 THE COURT: I don't know what you're holding  
17 up.

18 MR. MERER: This is a Newsday article, okay?  
19 This is among the documents I handed up to the Court.  
20 It's attributed by the reporter, who I have spoken to and  
21 have done his secrecy thing and said I stand by what I  
22 said, it's attributed to law enforcement sources and it  
23 talks about this threat. It talks about when Mr. Patino  
24 first arrived from MDC-SHU that first night. In the  
25 morning he was picked up by a convoy of ten or twelve

**Proceedings**

1 armored vehicles manned by SWAT teams, state troopers ---

2 THE COURT: Was that Bob Kessler?

3 MR. MERER: Yes.

4 THE COURT: He's in this courthouse every day.

5 MR. MERER: I know that, your Honor. But --

6 THE COURT: And he is going to be watching you.

7 MR. MERER: And I will be watching him. But

8 the bottom line, Judge, is that Long Island, Suffolk  
9 County, Nassau County is a geographically insular  
10 community and people read Newsday. What effect does this  
11 have on Mr. Patino's ability to get a fair trial?

12 THE COURT: The problem is that our pool, our  
13 jury pool, is drawn from all five districts and all five  
14 boroughs -- not five -- yes, five; Staten Island, Queens,  
15 Brooklyn --

16 MR. MERER: No, I don't think -- I mean I can  
17 request --

18 THE COURT: We draw from the same wheel that  
19 Brooklyn draws from.

20 MR. MERER: I can recall a case before  
21 Judge Wexler where every single juror came out of Nassau  
22 County.

23 THE COURT: There was a time -- when was that,  
24 Mr. Merer?

25 MR. MERER: Probably about 300 years ago, but -

**Proceedings**

1 -

2 THE COURT: All right. Well 300 years ago  
3 there was a time when there was a Long Island wheel which  
4 was representative of just Long Island residents.

5 MR. MERER: Right.

6 THE COURT: But that has since changed.

7 MR. MERER: Yes.

8 THE COURT: The wheel is now the same wheel  
9 that Brooklyn draws from.

10 MR. MERER: And since I --

11 MR. BODE: And anecdotally --

12 MR. MERER: -- grew up in Brooklyn, I can live  
13 with that.

14 THE COURT: Okay.

15 MR. BODE: Anecdotally, I have had Staten  
16 Island jurors in the past year sitting on a jury here.

17 THE COURT: Right. And I have presided over  
18 many trials with Brooklyn, Queens, Staten Island  
19 residents. It always surprises me when a Staten Island  
20 resident agrees to serve as a juror out here but they do  
21 all the time. All right.

22 Look, to me, the case related rule changes the  
23 whole complexion of things. And what I was going to say  
24 is the following. Since this starts out, it sounds like,  
25 a case that which had original questions to Queens and



**Proceedings**

1 Kings County, went to Judge Seybert while she was sitting  
2 in Brooklyn, a very proper designation, it follows her  
3 when she comes out to Long Island, to the extent that  
4 there's an argument and which is what I hear, that there  
5 isn't enough of a relationship, I am actually going to  
6 leave that to Judge Seybert because she knows the whole  
7 history of this from day one. And my impression of this  
8 is that she sees this as very definitely connected to  
9 things that she's reviewed in the past but I am not going  
10 to go over all of the prior indictments and all the prior  
11 cases to make sure there's that nexus.

12 And she has that intimate knowledge. And if  
13 her knowledge supports the view that there is a  
14 connection between the cases, that's good enough.

15 MR. MERER: So your recommendation is that  
16 there will be none on that third motion.

17 THE COURT: Right.

18 MR. MERER: Okay.

19 THE COURT: All right. Given the way that  
20 argument has been shaped now, I think that you know, the  
21 factual nexus is one which she can easily answer having  
22 an intimate knowledge of the facts of all of these cases  
23 and it would be a lot simpler for her to do that, given  
24 that the start of this assignment was correct as conceded  
25 by both sides.

**Proceedings**

1           MR. MERER: Just for the record, your Honor, I  
2 believe she was assigned this case after she was here  
3 because -- on the idea that the related cases followed  
4 her out.

5           THE COURT: Correct.

6           MR. MERER: But that --

7           THE COURT: That's right.

8           MR. MERER: Okay.

9           THE COURT: That's right. That's what I  
10 understood.

11          MR. MERER: Okay.

12          THE COURT: All right. So now that leaves us  
13 with having to figure out some dates.

14          MR. BODE: In terms of -- I leave it up to  
15 your Honor in terms of if you want to do this in terms of  
16 have a date when we can bring in the -- someone from the  
17 BOP, given that they've been looking at these new  
18 allegations, et cetera. We can do that relatively  
19 quickly.

20                 In terms of witnesses, they'll need a little  
21 time to move folks if we're going to do that. So we  
22 could do a date and then if we're going to go further,  
23 have a ruling on that next date in terms of the  
24 administrative exhaustion and judicial exhaustion and  
25 then set a date after that or we could set a little

**Proceedings**

1 further date and -- I leave it up to your Honor.

2 THE COURT: All right. Hold on. Let me just  
3 pull up a calendar.

4 (Court and clerk confer)

5 THE COURT: We can start the hearing on Monday  
6 the 23rd at 2 o'clock.

7 MR. MERER: Judge, this Monday next,  
8 your Honor?

9 THE COURT: Yes.

10 MR. MERER: At 2 o'clock.

11 THE COURT: At 2 o'clock. I have a criminal  
12 jury selection in the morning. I am pretty sure we can  
13 get that done fairly quickly.

14 MR. MERER: As long as -- can we end by 5:30  
15 that day, Judge?

16 THE COURT: Yes, I --

17 MR. MERER: If we have to continue, we can go  
18 further the next day?

19 THE COURT: Right. We can go into the next  
20 day.

21 MR. MERER: I appreciate it. Thank you.

22 THE COURT: And then what I would like you to  
23 do is reserve Thursday, the 26th.

24 (Court and clerk confer)

25 THE COURT: Thursday, the 26th for whatever

**Proceedings**

1 follow-up.

2 MR. BODE: Okay. I won't be able to have -- I  
3 will try, Judge, but I sincerely doubt I will have  
4 witnesses by then.

5 THE COURT: All right.

6 MR. BODE: They're not in the district.

7 THE COURT: Well I am concerned about going too  
8 far out.

9 MR. MERER: Judge, is that morning or afternoon  
10 or the whole day?

11 THE COURT: What was that?

12 MR. MERER: What time on the 26th --

13 THE COURT: Well, if --

14 MR. BODE: I mean it's a week from today. I  
15 will never get people moved here by then.

16 THE COURT: Okay. All right. Then that's --

17 MR. MERER: But, your Honor, if I could just  
18 interject. I am reasonably -- I don't want to say  
19 something I am not sure about. I suspect that the  
20 witnesses that Mr. Bode is referring to are coming from  
21 Florida. I know as fact that the government has brought  
22 these witnesses up here numerous times and others like  
23 them, some of whom have not turned out the way they would  
24 have hoped.

25 It seems to me, Judge, that under the

**Proceedings**

1 circumstances the government could reach out and make it  
2 happen. They certainly would, if there was a trial and  
3 they needed those witnesses to prove up a case.

4 THE COURT: The only -- that may be so.

5 MR. MERER: Yes.

6 THE COURT: But if the 26th is not workable,  
7 it's not going to -- March 3 would be the next day --  
8 would be the -- the 26th is I believe a Thursday;  
9 correct? So by the following Tuesday, that gives you a  
10 few extra days --

11 MR. BODE: I will get the writs going today,  
12 Judge. If there's -- if I learn from the marshal's  
13 service that the date is after that, I will submit a  
14 letter to your Honor.

15 THE COURT: Right. All right. So let's just  
16 set aside March 3. Oh, wait a minute, is that that --

17 (Court and clerk confer)

18 THE COURT: So here's what we're going to do.  
19 Apparently I have a trial that week but I am going to --  
20 instead of the 3rd, make it March 2, the Monday. Then I  
21 can move the trial back --

22 MR. MERER: March? March?

23 THE COURT: March 2.

24 MR. MERER: All right.

25 THE COURT: 10 a.m.

**Proceedings**

1 MR. MERER: 10 a.m., your Honor?

2 THE COURT: 10 in the morning. I'm pretty sure  
3 we could have -- we can have the prisoner here by 10:00;  
4 correct? Yes?

5 UNIDENTIFIED MALE SPEAKER: Oh, I am sorry,  
6 Judge. That shouldn't be a problem.

7 THE COURT: Okay.

8 UNIDENTIFIED MALE SPEAKER: 10 a.m.?

9 THE COURT: 10:00; yes. So reserve March 2 and  
10 the 26th. Was it --

11 MR. BODE: 23rd.

12 THE COURT: 23rd, sorry.

13 MR. MERER: 23rd?

14 THE COURT: 23rd.

15 MR. MERER: 23rd all day, your Honor?

16 THE COURT: No, 23rd starting at 2 o'clock;  
17 correct?

18 MR. MERER: Oh, I am sorry. And then the --

19 THE COURT: And then the follow-up would be  
20 March 2.

21 MR. BODE: And --

22 MR. MERER: So we're -- the 26th is off then.

23 THE COURT: The 26th is off.

24 MR. BODE: And if need be, the 23rd, into the  
25 morning of the 24th, your Honor, if we need to go past

**Proceedings**

1 5:30.

2 THE COURT: Yes. Correct.

3 MR. BODE: Thank you.

4 MR. MERER: All right. So there will be  
5 argument on the exhaustion issue on the next appearance  
6 and then the Court will determine what then follows?

7 THE COURT: Right. I think what we can expect  
8 is that on the 23rd, we'll take some testimony. I am not  
9 -- I am very optimistic that we're going to finish that  
10 issue on the 23rd but if need be, we'll extend into the  
11 24th. And then to the extent that we have the taking of  
12 testimony on the actual threat, that would occur on the  
13 2nd.

14 MR. MERER: Your Honor, I am going to make a  
15 request then. If, and just so the government can be  
16 prepared, if in fact your Honor rules that we are going  
17 to go ahead to the second date and directs the government  
18 to produce witnesses, I am going to ask that the  
19 government also produce Agent Viola.

20 And I say that because I am of the belief that  
21 Agent Viola has spoken to these witnesses and he has had  
22 dealings with their associates and that his testimony  
23 subject to the Court's ruling is proper, and the  
24 question's proper, may be very pertinent to whatever  
25 decision your Honor comes to.

**Proceedings**

1           THE COURT: Can you produce him, Mr. Bode?  
2 Have him available, whether or not he actually has to  
3 testify we'll decide at another point.

4           MR. BODE: Yes.

5           THE COURT: But have him available.

6           MR. BODE: I would say Mr. Merer should give me  
7 a subpoena and I will give it to him and his agency.

8           THE COURT: All right. Make sure he is  
9 available for the 2nd.

10          MR. BODE: Of --

11          THE COURT: Of March.

12          MR. BODE: I will give him the subpoena. It's  
13 up to the agency and him in terms of whether, you know, I  
14 am --

15          THE COURT: I am directing you to have him  
16 available for March 2. Is that subpoena enough?

17          MR. BODE: Yes, Judge. I am just saying in  
18 terms of, you know, him, I -- you know, I don't know  
19 whether he's going to -- you know, whether he's going to  
20 assert any rights to counsel or anything like that, given  
21 the application.

22          THE COURT: Well that's why you should --

23          MR. BODE: That's why I want the --

24          THE COURT: -- tell him now.

25          MR. BODE: That's why I want a subpoena, so



**Proceedings**

1 that I have a subpoena from counsel to give to, you know  
2 to him and to give to his agency.

3 THE COURT: I --

4 MR. MERER: Your Honor, I don't mean to quibble  
5 but if I don't -- I do not see the need for me to  
6 subpoena Agent Viola.

7 THE COURT: I am not ordering a subpoena. I  
8 directed that Agent Viola be available to testify on  
9 March 2. The question of whether or not he will be  
10 required to testify is one which I leave open, depending  
11 on how the matter goes but he should be available.

12 If he has issues that -- of concern which  
13 require counsel, then he should certainly have counsel  
14 available to him if he feels it's necessary. Okay?  
15 Conduct himself as though he had been subpoenaed. That's  
16 -- I don't think it actually requires a subpoena; if he  
17 has some issues or concerns about whether or not there is  
18 some jeopardy here for him. All right.

19 Anything else?

20 MR. MERER: Thank you, your Honor.

21 THE COURT: Okay, folks, thank you.

22 MR. BODE: Thank you.

23 (Matter concluded)

24 -oOo-

25

C E R T I F I C A T E

I, ROSALIE LOMBARDI, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 20th day of February , 2009.

  
Rosalie Lombardi  
Transcription Plus II